



Virginia
Regulatory
Town Hall

townhall.state.va.us

Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	DEPT. OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC 30 –120-211 through 12 VAC 30-120-249
Regulation title	Waiver Services: Home and Community Based Services Mental Retardation Waiver
Action title	MR Waiver Renewal
Document preparation date	; NEED GOV APPROVAL BY OCT 28 th

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Preamble

The APA (Section 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 1) Please explain why this is an “emergency situation” as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

The Administrative Process Act (Section 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation

shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date. This suggested emergency regulation meets the standard at *COV 2.2-4011(ii)* as discussed below.

The Department of Medical Assistance Services was directed in Chapter 4 of the *2004 Acts of the Assembly*, Item 326 PP to renew its waiver program for persons with mental retardation:

“Upon approval by the Centers for Medicare and Medicaid Services of the application for renewal of the Mental Retardation Waiver, expeditious implementation of any revisions shall be deemed an emergency situation, the Department of Medical Assistance Services shall promulgate emergency regulations to implement the provisions of this act.”

The Governor is hereby requested to approve this agency’s adoption of the emergency regulations entitled Waiver Services: Home and Community Based Services Mental Retardation Waiver and also authorize the initiation of the permanent rule promulgation process provided for in § 2.2-4007 of the *Code of Virginia*.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of this regulatory action is to conform the agency’s regulations with recent federally approved changes to this waiver program which have resulted from the federally required waiver renewal process. This program provides supportive services in the homes and communities of persons with diagnoses of mental retardation or children younger than the age of six years who are at risk of developmental delay. This program permits these individuals to remain in their homes and communities rather than being institutionalized in Intermediate Care Facilities for the Mentally Retarded. All federal home and community based waiver programs must be renewed every five years as required by federal law.

Legal basis

Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid

authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

Substance

Please detail any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons why the regulation is essential to protect the health, safety, or welfare of Virginians. Delineate any potential issues that may need to be addressed as a permanent final regulation is developed.

The regulations that are affected by this action are the Waiver Services regulations for the MR Waiver program (12 VAC 30-120-211 through 12 VAC 30-120-249)

Due to the requirements of federal law, the previously approved MR waiver application is due to expire in September, 2004. In order to continue claiming federal matching dollars for this valuable home and community-based service, DMAS sought federal approval of a renewal of the existing waiver program based on recommendations from its MR Waiver Advisory Committee. This committee consisted of a diverse group of stakeholders (waiver recipients, family members/caregivers of individuals with disabilities, advocates, providers and other state agency (specifically DMHMRSAS representatives)) to advise the agency about waiver program policies. The waiver renewal application submitted to CMS reflected DMAS' efforts, in collaboration with the MR Waiver Advisory Committee, to better meet the needs of individuals who receive waiver services and to streamline processes.

The federal funding agency, the Centers for Medicare and Medicaid Services, approved the renewal of this waiver as reflected in these regulatory revisions.

In general, regulation changes include the following:

- 1) Clarifies that individuals found to have committed barrier crimes listed in *The Code of Virginia* §37.1-183.3 will be ineligible to be providers under this waiver.
- 2) Revises the situations that are considered at risk for crisis stabilization services.
- 3) Adds language to clarify that crisis supervision is an optional component of crisis stabilization:
- 4) Changes the due date for submission of the crisis stabilization individual service plan to the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) to within 72 hours of "the requested start date of authorization".
- 5) Clarifies that "group" supported employment services are limited to 780 units per consumer service plan year.
- 6) Adds a definition of center-based and non center-based prevocational services.
- 7) Adds a definition of criteria for receiving prevocational services at the intensive level.
- 8) Changes the definition of skilled nursing services to indicate that the services to be offered must be those that do not meet the home health criteria. In addition, skilled nursing may be used to provide consultation for nurse delegation activities and provide oversight of direct care staff who provide the actual nursing care.

- 9) Removes the requirement that individuals living under the same roof need to provide documentation that they are the only provider available in order to provide care.
- 10) Clarifies that DMHMRSAS approves the test direct care staff of licensed providers have to take.

The following chart identifies the changes made to the regulations and the rationale for the change:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
12 VAC 30-120-211	Not applicable (N/A)	Definitions	One definition was revised to provide clarity and guidance to providers and other stakeholders.
12VAC 30-120-215	N/A	Individual eligibility requirements	Added "waiver" before the word services to provide clarity and guidance to providers and other stakeholders.
12VAC30-120-225	N/A	Consumer-directed services: personal assistance, companion, and respite	<p>The following changes were made to provide stakeholders with greater clarity and to make the regulations consistent with the federally approved waiver application for this program:</p> <p>A) Removed the word "companion" when referring to the provision of special tasks, as companions are not able to provide assistance with special tasks.</p> <p>B) Added the word "Central" when talking about the Child Protective Registry.</p> <p>C) Identified the provider as "Services Facilitator" when referring to documentation requirements such as quarterly reports.</p> <p>D) Clarified that skilled nursing is a type of consultation that can be requested as needed.</p> <p>E) Text removed from subsection C because it duplicated the same language in subsection B.</p>
12VAC30-120-227	N/A	Crisis stabilization services	<p>The following changes were made to provide stakeholders with greater clarity and to make the regulations consistent with the federally approved waiver application for this program:</p> <p>A) Changed the situations that an individual must be in to be considered at risk of needed crisis stabilization services.</p> <p>B) Added language to clarify that crisis supervision is an optional component of</p>

			<p>crisis stabilization.</p> <p>C) Changed the due date of submission of the crisis stabilization individual service plan to the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS).</p>
12VAC30-120-229	N/A	Day support services	New language clarifies the limit on this service in combination with other services to prevent potential misinterpretation.
12VAC30-120-233	N/A	Personal assistance services (agency-directed model)	Renumbered the provider requirements to indicate the requirements apply to both DMHMRSAS licensed and other DMAS enrolled personal care providers to give providers and other stakeholders greater clarity.
12VAC30-120-237	N/A	Prevocational services	<p>The following changes were made to give providers and other stakeholders with greater clarity:</p> <p>A) Clarified the definition of center-based and non center-based prevocational services.</p> <p>B) Provided criteria for receiving prevocational services at the intensive level.</p>
12VAC30-120-241	N/A	Residential support services	Clarified that the test direct care staff of licensed providers have to take is “approved” by DMHMRSAS.
12VAC30-120-243	N/A	Respite services (agency-directed model)	Renumbered provider requirements to indicate appropriate requirements for both DMHMRSAS licensed providers and providers enrolled with DMAS to give providers and other stakeholders with greater clarity.
12VAC30-120-245	N/A	Skilled nursing services	<p>The following changes were made to give providers and other stakeholders with greater clarity and to make the regulations consistent with the federally approved waiver application for this program:</p> <p>A) Definition of skilled nursing changed to indicate that the services to be offered through skilled nursing must be those that do not meet the home health criteria.</p> <p>B) Clarified that skilled nursing services through the waiver, may be used as consultation for nurse delegation and oversight of direct care staff to other providers as appropriate.</p>

12VAC30-120-247	N/A	Supported employment services	Clarified the limitation for individual supported employment to give providers and other stakeholders clarity.
-----------------	-----	-------------------------------	--

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action.

Policy alternatives were discussed in the early referenced context of the MR Waiver Advisory Committee and the policies contained herein were reached by consensus with that group.

No other feasible alternatives are available as the emergency regulations are required so the regulations can be in compliance with other state and federal laws and requirements.

Family impact

Please assess the impact of the emergency regulatory action on the institution of the family and family stability.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; or encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents. It does not strengthen or erode the marital commitment and is not expected to affect disposable family income.